

## HUMAN SERVICES BOARD

## INTRODUCTION

## Procedural History

DAIL held a Commissioner's Review on May 18, 2009. On May 26, 2009, the Commissioner's Review was issued upholding the denial of CFC eligibility and finding that petitioner's

needs could be met through the Assistive Community Care Services (ACSS) program at a residential care home.

The petitioner filed for a fair hearing on June 26, 2009. Testimony was taken on August 25, 2009 and September 3, 2009.

The petitioner presented testimony from Dr. J.B., her treating physician; D.L., the administrator from the residential care home caring for petitioner; W.M., her case manager from the local area agency on aging; and G.D., her son. DAIL presented testimony from P.B., LTCCC; N.M., DAIL Medicaid waiver supervisor, and D.O'V., DAIL director of clinical services.

The parties stipulated to the admission of (1) April 19, 2009 CFC Application, (2) April 15, 2009 Resident Assessment from the residential care home, (3) April 29, 2009 clinical assessment by P.B., (4) April 30, 2009 Clinical Eligibility Worksheet, (5) April 30, 2009 Notice of Decision, (6) May 26, 2009 Commissioner's Review, (7) June 15, 2009 letter by Dr. J.B., and (8) July 16, 2009 Clinical Assessment of Needs by Dr. J.B.

The following is based on the testimony and stipulated exhibits.

FINDINGS OF FACT

1. The petitioner is a ninety-year-old woman who weighs ninety pounds.

2. Petitioner is diagnosed with end stage lung disease, hypertension, osteoporosis, cardiac arrhythmias, anxiety disorder, and slight dementia. She is hard of hearing. She uses a cane for ambulation.

3. Petitioner was last hospitalized in April 2008 for an infection. She was released to a nursing home for rehabilitation. During June 2008, she was admitted to a level III residential care home as a private pay patient.

4. Level III residential care homes cannot care for a resident who needs nursing home level services unless granted a variance for Enhanced Residential Care (ERC). The residential care home providing care for petitioner has not applied for a ERC variance. In addition, they do not provide Assistive Community Care Services.

5. Petitioner is close to exhausting her monies for payment to the residential care home. She made her application for CFC to obtain funding through Medicaid to maintain her care.<sup>1</sup>

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<sup>1</sup> It is not clear whether petitioner is seeking community Medicaid to help defray any of her costs.

6. Petitioner receives continuous Oxygen therapy. She has a cannula placed over her nose for the delivery of oxygen.

7. Sometimes petitioner removes the cannula or the cannula falls off. Petitioner is unable to put the cannula back on.

8. If petitioner is without oxygen, her oxygen saturation levels can decrease raising the possibility of medical complications.

9. The residential care home moved petitioner into a room near the nurse's station to better monitor whether petitioner's cannula was on her nose and to place the cannula back on when necessary. The residential care home provides this monitoring and service through nursing staff.

10. It is not necessary to have trained nurses monitor and replace the cannula on petitioner. Anyone can monitor and put the cannula back on petitioner.

11. The residential care home uses nurses to check petitioner's oxygen saturation levels.

12. A skilled LPN or respiratory therapist is capable of checking oxygen saturation levels.

13. The petitioner's oxygen saturation levels are not checked daily; they are checked approximately once/week.

14. Petitioner receives nebulizer treatments four times per day. She needs to be prompted in the use of the nebulizer.

15. The residential care home uses nursing staff to administer the nebulizer.

16. It is not necessary to use nursing staff to administer the nebulizer. Respiratory therapists, medical technicians, or personal care attendants can administer the nebulizer.

17. Petitioner has not experienced any COPD exacerbations in the past year.

18. Petitioner has not been to the emergency room in the past year.

19. Petitioner does not need the level of assistance with her activities of daily living that meet CFC eligibility criteria.

20. The residential care home provides a high level of service and monitoring of petitioner.

21. The petitioner's medical condition has been stable for the past year.

22. The residential care home's level of service contributes to petitioner's stable medical condition.

ORDER

DAIL's decision to deny CFC eligibility is affirmed.

REASONS

The Choices for Care (CFC) program is a Medicaid waiver program authorized under Section 1115(a) of the Social Security Act. Medicaid waiver programs allow States latitude in meeting the medical needs of their residents.

Congress targeted home health care and services as an alternative to institutionalization as an area for Medicaid waivers by stating in 42 U.S.C. § 1396n(c)(1) that:

The Secretary may by waiver provide that a State Plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home and community-based services ...which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals **require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded.** . (emphasis added).

The Vermont Legislature endorsed the idea of obtaining a Medicaid 1115 waiver to allow individuals choice between "home and community based care or nursing home care" in Act 123 (2004). DAIL has obtained approval for such a waiver from the Centers for Medicare and Medicaid Services.

To further the purpose of allowing individuals needing nursing home level of care the opportunity to stay in their homes or community placements rather than enter a nursing home, DAIL has adopted regulations through the Vermont Administrative Procedures Act setting out eligibility criteria.

The petitioner is seeking eligibility through either the highest needs or the high needs criteria. The petitioner has the burden of proof in making a case for initial eligibility for the CFC program.

The applicable eligibility criteria for the highest needs group is found at Choices for Care 1115 Long-term Care Medicaid Waiver Regulations (CFC Reg.) IV.B.1; the pertinent sections state:

iii. Individuals who have at least one of the following conditions or treatments that require skilled nursing assessment, monitoring, and care on a daily basis:

Stage 3 or 4 Skin Ulcers	Ventilator/Respirator
IV Medications	Naso-gastric Tube Feeding
End Stage Disease	Parenteral Feedings
2 <sup>nd</sup> or 3 <sup>rd</sup> Degree Burns	Suctioning

iv. Individuals who have an unstable medical condition that requires skilled nursing assessment, monitoring and care on a daily basis related to, but not limited to, at least one of the following:

Dehydration	Internal Bleeding
Aphasia	Transfusions
Vomiting	Wound Care

Quadriplegia	Aspirations
Chemotherapy	Oxygen
Septicemia	Pneumonia
Cerebral Palsy	Dialysis
Respiratory Therapy	Multiple Sclerosis
Open Lesions	Tracheotomy
Radiation Therapy	Gastric Tube Feeding

The applicable regulation for eligibility for the high needs group is CFC Reg. IV.B.2.v which states:

Individuals who have a condition or treatment that requires skilled nursing assessment, monitoring, and care on a less than daily basis including, but not limited to, the following:

Wound Care	Suctioning
Medication Injections	End Stage Disease
Parenteral Feedings	Severe Pain Management
Tube Feedings	

**AND** who require an aggregate of other services (personal care, nursing care, medical treatments or therapies) on a daily basis.

As will be discussed below, the petitioner has not met her burden of proof that she meets the eligibility criteria for either the highest needs or high groups.

It is understandable that the petitioner wants to find a way to fund her current placement now that her ability to private pay is ending. She has received both continuity of care and good care. As a result, her medical condition is stable. If petitioner is not found eligible for the CFC

program and the current placement does not request an ERC variance, petitioner may need to relocate.<sup>2</sup>

It should be noted that her present placement is not a nursing home; her medical needs can be met in a residential care placement as evidenced by her present placement. DAIL will fund Assistive Community Care in a residential care setting provided the residential care facility accepts such funding. Petitioner's current placement does not accept this program.

Petitioner first argues that she has an unstable medical condition requiring daily skilled nursing assessment, monitoring and care. The evidence does not support this argument. Petitioner's condition is stable. She has not experienced any emergency room visits, hospital stays, or exacerbation of her breathing problems in the past year. There has been no evidence of changing medical treatment to address a condition that will not stabilize. An unstable medical condition would make itself apparent through an exacerbation of symptoms or the need for medical intervention. Neither exists here.

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<sup>2</sup>It should be noted that even if petitioner were eligible for CFC, she may need to relocate because her current placement could not keep her unless DAIL granted an ERC variance.

The petitioner is fearful that without the level of services she currently receives, her condition may deteriorate. However, the services she needs can be delivered within a residential care facility. Although her current placement uses nursing staff, daily skilled nursing assessment, monitoring, and care are not necessary to make sure that petitioner's cannula is in place or put back on or to help petitioner use her nebulizer. Petitioner does not now need nor has she received daily checks of her oxygen saturation levels. In addition, these checks can be done by others such as respiratory therapists. Even if petitioner's medical condition were to be considered unstable, she does not meet the prong of needing daily skilled nursing assessment, monitoring and care of her Oxygen therapy or the use of her nebulizer. Staff at residential care homes routinely monitor and assist residents with Oxygen therapy and with medications.

Petitioner argues that her end stage disease necessitates a finding of CFC eligibility. The eligibility criteria for the highest group incorporates daily skilled nursing assessment, monitoring and care. As stated above, petitioner has not made the case for these needs. In addition, the evidence is not sufficient under the high needs

group to show the level of skilled nursing care and the daily aggregate of services that are needed for the high needs group.

Petitioner further argues that her case is supported by Dept. of Health v. Brown, 935 A.2d 1128 (Md. Special Court of Appeals, 2006). However, the Maryland statutes and waiver included intermediate level of care (less than daily skilled nursing services or supervision). However, the Vermont waiver does not incorporate the same level of care as Maryland.

The CFC eligibility criteria are predicated on the need for nursing home level care. Without that level of need, eligibility cannot be found. The petitioner has not met her burden of proof. Accordingly, DAIL's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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